Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

Hospital Building Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit sitting *en banc* entered in this case (No. 73-1627) on February 18, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, is reported in 1975 Trade Cases ¶ 60,166 (Appendix A hereto). The order of the Court of Appeals granting rehearing *en banc* and withdrawing the previous opinion of the panel is not reported. (Appendix B hereto). The opinion of the panel of

the Court of Appeals affirming *per curiam* the order of the District Court is reported in 1974-1 Trade Cases ¶ 74,903 (Appendix C hereto). The opinion of the District Court (Civil No. 4048) is reported in 1973 Trade Cases ¶ 74,428 (Appendix D hereto).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of a panel of the United States Court of Appeals for the Fourth Circuit in this case was first filed and entered on February 6, 1974 affirming *per curiam* the order of the District Court. Thereafter a petition for rehearing *en banc* was filed February 19, 1974. On June 11, 1974, the petition for rehearing *en banc* was granted, and the opinion of the panel dated February 6, 1974 was withdrawn. The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirming the order of the District Court over the dissent of Judges Winter, Butzner, and Field was entered on February 18, 1975.

QUESTIONS PRESENTED

This case presents the question of the scope of Congressional power exerted under the Sherman Act to prohibit (i) anticompetitive conduct in the provision of hospital services and (ii) monopolization of the provision of hospital services. This question arises in the context of the existence of a nationwide network of financing and providing health care services, a network which has evolved as a result of (i) the involvement of the federal government through Medicare and Medicaid and (ii) the growth of national private health insurance companies such as Blue Cross.

In particular, the questions presented are:

1. Is the impact on interstate commerce of a conspiracy to block the expansion of a hospital so indirect and unsubstantial that the hospital cannot, as a matter of law, state a claim for relief satisfying the "effect on commerce" test of jurisdiction under the Sherman Act where the following facts are alleged:

   (a) The proposed expansion is a virtual tripling of the facility's capacity at a cost of $4,000,000 expected to be financed by one or more loans from out-of-state lenders, and

   (b) The facility in 1972, prior to the proposed expansion, purchased $112,846 of supplies and equipment, 80% of which was paid pursuant to national contracts negotiated by the facility's out-of-state parent corporation, and

   (c) The facility purchased $36,000 of management services in 1972, prior to the proposed expansion, from its out-of-state parent corporation, and

   (d) Approximately 95% of the facility's billings in 1972, prior to the proposed expansion, were made to national insurance companies and to the federal government?

2. Is the provision of hospital services a purely local, intrastate activity, so that a provider of hospital services cannot, as a matter of law, state a claim for relief satisfying the "in commerce" test of jurisdiction under the Sherman Act?

2. Did the District Court err in dismissing a Sherman Act complaint on the pleadings, either for failure to state a claim or for lack of jurisdiction, without allowing any discovery and without the submission of any evidence?

STATUTES INVOLVED

1. The Sherman Act, Section 1 (15 U.S.C. § 1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

2. The Sherman Act, Section 2 (15 U.S.C. § 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

3. The Clayton Act, Section 4 (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

4. The Clayton Act, Section 16 (15 U.S.C. § 26) provides in relevant part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of

> the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danager of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."

5. 28 U.S.C. § 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

STATEMENT OF THE CASE

A. Basic facts.

This is a civil antitrust action for treble damages of at least $2,400,000 and injunctive relief initiated by the petitioner Hospital Building Company (hereafter "HBC"), a North Carolina corporation. The Complaint alleges violations of Sections 1 and 2 of the Sherman Act. HBC argues that the principal purpose of the alleged conspiracy was to hold the number of hospital beds in the relevant market at an artificially low level thereby restricting the output of hospital services and enabling HBC's two competitors to fix prices, paid in large part through Medicare or by national health insurance companies, at an artificially high level.

As alleged in the Complaint, HBC operates Mary Elizabeth Hospital (hereafter "Mary Elizabeth") a proprietary ("for profit") hospital. As further alleged, the Defendant, Trustees of Rex Hospital, a Corporation, operates Rex Hospital (hereafter "Rex") a private, tax-exempt hospital. Also named as Defendants are three individuals, two of whom are alleged to be administrators or trustees of Rex. For convenience, all the Defendants are referred to as the "Raleigh Group". Also named in the Complaint as co-conspirators but not as defendants are two individuals and Wake County Hospital System, Inc. which is alleged to operate Wake County Memorial Hospital (hereafter "Wake") a government hospital.

The nature of the conspiracy alleged was described by the United States Court of Appeals for the Fourth Circuit in the majority opinion as follows (App. A-3, A-4):

> "HBC alleged below that, beginning at least as early as 1970 and continuing through the present, the Raleigh Group together with others not parties to this suit have

> engaged in a conspiracy aimed at controlling the number of hospital beds, allocating customers (hospital patients), and otherwise exercising unreasonable restraints of and monopolizing the market for medical-surgical hospital services in 'the Raleigh area,' defined as 'the area comprising Wake County, in the State of North Carolina.'
>
> HBC professed to have discovered the conspiracy in late 1971 when it undertook to relocate Mary Elizabeth and expand it from 49 to 140 beds. According to HBC the Raleigh Group and their coconspirators devised a scheme involving bad faith efforts to block authorization of the expansion,[1] tactics to hold up implementation of HBC's plans once authorization was gained, and finally malicious instigation of adverse publicity and general public antipathy.
>
> [1] [Footnote by the Court] At the time HBC sought authorization, North Carolina law required a certificate of need prior to hospital expansion. *See* In Re Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the requirement was held to violate the constitution of North Carolina."*

The Complaint, as amended, alleges:

> "In its operation of Mary Elizabeth Hospital, Hospital Building Company is doing business in interstate commerce. The combination and conspiracy complained of herein has a substantial and direct effect on interstate commerce."

The District Court summarized the specific allegations of the Complaint, as amended, regarding interstate commerce as follows:

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* HBC's claim is that the activities of the Raleigh Group before the state regulatory hearings on the certificate of need are not within the permissible area defined by this Court in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), but this issue is not now presented for decision.

"1. Plaintiff is the wholly-owned subsidiary of a Delaware corporation which owns, directly or indirectly, and operates or manages medical-surgical hospitals in five states and Puerto Rico.

2. Plaintiff purchases on a regular and continuing basis substantial amounts of goods, supplies and medicines from vendors in states other than North Carolina.

3. Plaintiff regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business.

4. A substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals.

5. Plaintiff receives a substantial part of its revenue from medicare, medicaid and hospital insurance benefits from insurance companies located outside North Carolina.

6. The planned expansion of plaintiff's present facilities will cost in excess of four million dollars which will be financed through one or more lenders located outside North Carolina.

7. Plaintiff's present hospital is accredited by the Joint Commission on Accreditation of Hospitals, a national organization which promulgates standards for the operation of hospitals." (App. D-2, D-3)

As the Court of Appeals below noted, the Complaint also alleged the purchase by HBC of management services from its parent, Charter Medical Corporation (hereafter "Charter") which is a Delaware corporation with its principal place of business in Macon, Georgia. In 1972, this purchase of management services was alleged to be $36,000. The Court of Appeals below stated as well:

"HBC's parent corporation was incorporated and is located outside of North Carolina, so that the purchase of services can be deemed interstate." (App. A-9)

B. **Proceedings in the District Court.**

Upon motion of the Defendants under Rule 12(b)(1) and (6), and without allowing any discovery, the District Court dismissed the Complaint, as amended, on the pleadings. It is not clear whether the reason for dismissal was failure to state a claim or lack of jurisdiction. The action dismissed was brought under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26). Subject matter jurisdiction lay in the District Court under 28 U.S.C. §1337.

The District Court held that the hospital business alleged is "strictly a local, intra-state business" and that despite the petitioner's transactions in interstate commerce, the "conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect interstate commerce." (App. D-3, D-4)

C. **Proceedings in the court below.**

Upon appeal by HBC, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the order of District Court *per curiam*. The Federation of American Hospitals, a trade association of approximately 500 investor-owned hospitals across the United States, stating its conviction that "the Court's decision on these issues will ultimately affect all investor-owned hospitals in this country", filed an *amicus curiae* brief in support of HBC's position on appeal.

Upon petition by HBC for rehearing *en banc*, the United States Court of Appeals for the Fourth Circuit granted rehearing *en banc* and withdrew the previous opinion of the panel.

After oral argument, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirmed the order of the District Court over the dissent of Judges Winter, Butzner, and Field.

The majority in the Court of Appeals below, speaking through Judge Craven, held that the District Court dismissed the Complaint on the pleadings for failure to state a claim. The majority did note, however, that the better course would have been to convert the Defendant's motion to one for summary judgment with at least limited discovery, yet did not remand the case with that instruction.

As to the merits, the majority held that the provision of hospital services is, as a matter of law, a "purely local activity." (App. A-5) Accordingly, to state a claim for relief within the jurisdiction of the Sherman Act, HBC would need to allege a conspiracy having a direct and substantial effect on interstate commerce.

The majority then held that the conspiracy alleged did not have a direct and substantial effect on interstate commerce. The majority stated that the intent of the Raleigh Group to direct their conspiracy only at intrastate commerce was relevant in determining the substantiality of the effect on interstate commerce. Further, the majority, in distinguishing *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186 (1954) and *Burke v. Ford*, 389 U.S. 320 (1967), asserted that the Complaint failed sufficiently to allege "anticompetitive power". (App. A-13)

Judge Winter, dissenting in the Court of Appeals below, joined by Judges Butzner and Field, cited this Court's discussion of the breadth of Sherman Act jurisdiction in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, — U.S. —, 43 U.S.L.W. 4059 (December 17, 1974) and argued that the proper test was "whether Congress could reach the alleged conduct under the commerce power." (App. A-16) Though the dissent agreed with the majority that the "in commerce" test of jurisdiction was not met, it argued that the conspiracy alleged did have a substantial and direct effect on interstate commerce.

Unlike the majority, the dissent found the opinion of the United States Court of Appeals for the Third Circuit in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973) "relevant and persuasive authority for reversing the district court in the instant case", especially with regard to whether a conspiracy allegedly directed solely at the intrastate aspects of a business could directly and substantially affect interstate commerce. (App. A-19)

The dissent focused particularly on the special nature of the federal interest in the health area:

> "There is, furthermore, a clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants.
>
> Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes." (App. A-21)

REASONS FOR GRANTING THE WRIT

This case presents the question of the scope of Congressional power exerted under the Sherman Act to prohibit anticompetitive conduct and monopolization of hospital services. The outcome of this case will determine, for all practical purposes, whether hospitals are exempt from the Sherman Act and thus can band together to raise the price of hospital services, including bills paid by the federal government through Medicare and by national health insurance companies, through allocation of the hospital services market in order to restrict output and hold prices at an artificially high level. Finally, it is clear that the Courts of Appeal are in need of an authoritative declaration from this Court affirming the Congressional grant of jurisdiction to the federal courts which is contained in the Sherman Act.

A. The Court of Appeals Below in Holding That the Conspiracy Alleged Does Not Directly and Substantially Affect Interstate Commerce Conflicts With Decisions of This Court and Other Courts of Appeal.

1. The Decision of the Court of Appeals Below Conflicts with Recent Decisions of Two Other Courts of Appeal Involving Alleged Conspiracies to Restrain the Provision of Hospital Services.

Two recent decisions, besides the decision below, have discussed the breadth of the "effect on commerce" test of jurisdiction under the Sherman Act with regard to conspiracies to restrain trade in the provision of hospital services. Both of those decisions conflict with the decision of the Court of Appeals below.

The decision of the Court of Appeals below conflicts with the decision of the United States Court of Appeals for the Third Circuit in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*,

490 F.2d 48 (3rd Cir. 1973). There the Third Circuit reversed a district court order dismissing, for want of jurisdiction, a Sherman Act complaint alleging anticompetitive conduct and monopolization of the provision of hospital services. Applying the "effect on commerce" test of jurisdiction under the Sherman Act, the Third Circuit held there was a substantial effect on interstate commerce because the flow of supplies in interstate commerce to the plaintiff hospital and one hundred similar hospitals in the relevant market could be substantially reduced by the alleged conspiracy.

The Third Circuit considered, and squarely rejected, the precedents relied upon by the District Court in this case. See *Doctors, Inc. v. Blue Cross of Greater Philadelphia, id.*, at 52-53.

In dissenting from the decision of the Court of Appeals below, Judge Winter stated that *Doctors, Inc.* was "relevant and persuasive authority for reversing the district court in the instant case." (App. A-19)

The decision of the Court of Appeals below, however, distinguishes *Doctors, Inc.*, arguing that the effect on interstate commerce in that case was substantial because of the "possible closing of a significant percentage of the hospitals in a metropolitan area." The majority contrasted that case to the instant case where it determined the effect to be insubstantial since it involved only "one small hospital's delayed expansion." (App. A-11)

In determining whether there is jurisdiction in the instant case under the "effect on commerce test," the following factors should be considered. In essence, the Complaint alleges a conspiracy by the only two competitors of HBC in the relevant market. These two competitors are allegedly seeking (i) to carve up for themselves the entire market in hospital service in Wake County and (ii) to allocate between themselves the artificially-restricted output of such services. Such monopolization and restriction of output inevitably affects the flow

of drugs, supplies, and services into the *entire* market, not simply the flow of goods and services to Mary Elizabeth alone.

The majority considered this a small case and unworthy of the federal judiciary's attention because Mary Elizabeth is a "small" (App. A-11) hospital. We respectfully submit that this analysis is misplaced. The effects alleged were not too "small", as measured by prior decisions of this Court. Moreover, it is not just the effects on Mary Elizabeth, but those on the entire market, which should have been measured.

As alleged in the Complaint, the State of North Carolina has determined that there is a shortage of 409 medical-surgical beds in the relevant market. Mary Elizabeth's proposed expansion was from 49 to 140 beds. With a capacity of only 49 beds, Mary Elizabeth purchased in 1972 $112,846 of drugs and supplies, 80% of which was paid pursuant to national contracts negotiated by Charter, HBC's parent corporation. Mary Elizabeth also purchased management services from Charter for $36,000 in that same year (see footnotes 3 and 5 in the opinion of the Court of Appeals below) (App. A-9). The proposed expansion of Mary Elizabeth to 140 beds would thus have substantially increased the flow of drugs, supplies and management services in interstate commerce to Mary Elizabeth. By preventing this expansion, the conspirators not only choked off this increased flow of interstate commerce, but in addition, according to the Complaint, they effectively eliminated the only meaningful competitor—Charter acting through HBC—and turned a three-competitor market into a two-competitor market.*

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* Compare Judge Craven's opinion in Greenville Publishing Company, Inc. v. The Daily Reflector, 496 F.2d 391 (4th Cir. 1974) at 396, holding that the Sherman Act reaches a conspiracy to restrain the business of publishing shopping guides in Greenville, S.C., and stating that "[t]he Supreme Court's approach strongly implies that the Sherman Act protects the market as well as the victim." In Raleigh, N.C., the Act apparently protects neither.

It is clear, therefore, that the Court of Appeals below was incorrect in viewing this case as a one-hospital case in contrast to a one-hundred-hospital case, and should have followed the authority of *Doctors, Inc.* In both this case and *Doctors, Inc.*, the flow of goods and services to the *entire* relevant market is potentially affected by the conspiracies alleged.

In addition to its failure to consider the full range of effects on interstate commerce flowing from the alleged conspiracy, the Court of Appeals below applied a test of substantiality more restrictive than and conflicting in principle with the decision of the United States Court of Appeals for the Fifth Circuit in *St. Bernard General Hospital, Inc. v. Hospital Service Asso. of New Orleans, Inc.*, — F.2d — (No. 74-2186, April 7, 1975), 1975 Trade Cases ¶ 60,256 (Appendix E hereto). There, the Fifth Circuit held that the district court erred in dismissing for lack of jurisdiction a complaint alleging violations of the Sherman Act respecting the rendition of hospital services. The case was remanded to the district court for further proceedings on the question of jurisdiction as well as other questions.

In analyzing the "effect on commerce" test, the Fifth Circuit focused primarily on the effects the alleged conspiracy there could have on the flow of drugs and supplies in interstate commerce. The district court had held as did the district court in this case, "that the rendition of hospital services is a purely local activity" and that " '[w]hat is essentially an intrastate activity is not transformed into interstate commerce by reason of such purchases, and there exists no substantial effect on interstate commerce by the indirect effect of reducing prospective purchases of supplys in interstate commerce.' " The Fifth Circuit rejected this approach—exactly the same taken by the Fourth Circuit majority in this case—saying that "we disagree with the court's purely-local-as-a-matter-of-law premise from which all conclusions, as well as the putative absence of a 'substantial effect' on interstate commerce followed." (App. E-6)

The Fifth Circuit viewed the district court's analysis as an overly narrow reading of *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961), a case which had already been rejected by the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied* 409 U.S. 1077 (1972). The Fifth Circuit stated that a conspiracy to restrain commerce in the rendition of hospital services could satisfy the "effect on commerce" test if the flow of goods into the state from out-of-state was "reduced or altered" substantially by the conspiracy. (App. E-8)

In contrast, the Court of Appeals below, citing *Page v. Work*, did not look to the substantiality of the effect on the *flow of goods* from out-of-state into the relevant market, but instead required a substantial effect on the *suppliers themselves* or on the *market price* of the goods:

> "Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected." (footnotes omitted) (App. A-10)

In applying the "effect on commerce" test, as the Fifth Circuit recognized, it is *not* the effect on the suppliers of goods or on the market price which must be substantial, rather it is the effect on the *flow* of goods and services in interstate commerce.[1]

In determining that these effects on interstate commerce previously discussed were not direct and substantial, the Court

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[1] The Fifth Circuit recognized "that the logic of *Hospital Building Co.* argues for a result contrary to that which we have reached." Nevertheless, the Fifth Circuit did not consider its decision to be in direct conflict with the decision in *Hospital Building Co.* (App. E-10). We submit, however, that the cases cannot be distinguished.

of Appeals below, citing among other cases, *Spears Free Clinic and Hospital v. Cleere*, 197 F.2d 125 (10th Cir. 1952), held that the purported intent of the Raleigh Group to direct their anticompetitive acts solely at a local activity, though not controlling, was relevant to the issue of jurisdiction under the Sherman Act.

In holding the intrastate intent of the conspirators to be relevant under the "effect on commerce" test, the Court of Appeals below conflicts with other Courts of Appeal. The United States Court of Appeals for the Third Circuit in *Doctors, Inc., supra*, upheld a Sherman Act complaint alleging a restraint on hospital services and discussed this question as follows:

> "There is no question about the factual similarity between *Spears* and its progeny, and the present case. If that case were persuasive authority we could undoubtedly rely on it to affirm the dismissal of the complaint in this action. However, the reasoning of *Spears* is defective in two major respects.
>
> First, the opinion even when it was written placed primary reliance on a series of cases that were no longer valid. These cases looked to the intent of the conspiracy alleged in order to determine whether the purported effects on interstate commerce conferred jurisdiction. If the aim of the conspiracy was to obstruct interstate commerce, it was said to have a 'direct' effect and jurisdiction was present. If the goal was otherwise, the effect was termed 'indirect' and there was no jurisdiction. This 'direct-indirect' test had been abandoned by the Supreme Court in the early 1940's. As a result, the reasoning of the opinion rested on flawed grounds even when it was issued in 1952." (at p. 52).

Further, the United States Court of Appeals for the Fifth Circuit in *Lehrman v. Gulf Oil Co.*, 464 F.2d 26, 36 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972), has stated:

> "The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business . . . It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices."

As these other Courts of Appeals have held in determining whether a conspiracy with respect to hospital services is actionable under the Sherman Act, the question of the directness and substantiality of an effect on interstate commerce is a matter of *impact*, not a matter of intent.

Thus, the decision of the Court of Appeals below conflicts with decisions of other Courts of Appeal in (i) failing to consider the full range of potential effects on interstate commerce of the conspiracy alleged; (ii) applying a standard of substantiality to the impact on the suppliers or the market price of goods and services instead of the impact on the flow of interstate commerce in the goods and services, and (iii) finding the intrastate intent of the alleged conspirators relevant in determining jurisdiction under the Sherman Act.

2. The Decision of the Court of Appeals Below Conflicts with Decisions of this Court and with Decisions of Other Courts of Appeal.

In *Burke v. Ford*, 389 U.S. 320 (1967) (*per curiam*), and in *United States v. Employing Plasterers Assn'.*, 347 U.S. 186 (1954), this Court has held that conspiracies allegedly directed at a purely intrastate market were actionable under the Sherman Act because there was a sufficient effect on the flow of out-of-state supplys to the local competitors. The decision of the Court of Appeals below conflicts with these two decisions.

In *Doctors, Inc., supra*, p. 53, the United States Court of Appeals for the Third Circuit described the central thrust of these two cases as follows:

> "There is no discussion of 'directness' or of the specific relationship between the interstate goods affected and the local market controlled. Nor is there even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." (footnotes omitted)

The Court of Appeals below attempts to distinguish these two cases by stating that the anticompetitive power alleged in those cases is not alleged in the instant case. As Judge Winter, dissenting in the Court of Appeals below, observed:

> "Similarly, I view the anticompetitive power alleged here as substantial. In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power 'which Congress sought to guard against' is merely to disbelieve the plaintiff's allegations." (App. A-20)

The decision of the Court of Appeals below also conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). There the Ninth Circuit held that by reason of the

purchase of supplies in interstate commerce, the local company's operations sufficiently involved interstate commerce to warrant jurisdiction under the Sherman Act. No mention was made of the dollar volume of these interstate purchases of supplies.

The decision in the Court of Appeals below also conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n.*, 484 F.2d 751 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) where the court, citing *Rasmussen*, adopted a broad view of jurisdiction under the Sherman Act in sharp contrast to the view adopted by the Court of Appeals below.

3. In Determining the Substantiality of the Restraints Upon Commerce of the Conspiracy, the Decision of the Court of Appeals Below Fails to Give Adequate Weight to the Involvement of the Federal Government in the Financing and Regulation of Hospital Services and Presents an Important Question in the Application of the Sherman Act.

In *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), petition for cert. filed *sub nom* Modern Asphalt Paving and Construction Co. (March 21, 1975), the Seventh Circuit held that the financing of a sewer project in part by the United States Department of Housing and Urban Development was a significant factor in finding jurisdiction under the Sherman Act:

> ". . . [F]unds for the project came from HUD and its appropriation to the city had to be increased after the bid, higher than the engineer's estimate, was received. HUD funds are transferred in interstate commerce. An increase in the amount of money required for this project would inevitably mean that there would be less money available for HUD projects elsewhere in the United States."

In the instant case, HBC has alleged that over a third of the billings by Mary Elizabeth in 1972 were made to the federal government under Medicare. The conspiracy to restrict output of hospital services, thereby raising the price of such services, has a direct impact on the flow of federal resources under this health care program, not just to HBC but to all hospitals in the relevant market.[2]

As argued by Judge Winter, dissenting in the Court of Appeals below:

> "There is, furthermore, a clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants." (App. A-21)

The intimate involvement of the federal government in the providing of hospital services is further highlighted by the fact that the *very expansion* the Raleigh Group is allegedly conspiring to prevent is subject to review under regulations issued by the Secretary of Health, Education, and Welfare pursuant to federal statute. A provider of hospital services, such as HBC, receives payment from the federal government under Medicare

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[2] The federal government spent $8,363,000,000, including administrative costs, in 1972 as its outlay under Medicine. Table No. 435, Federal Outlays for Selected Public Welfare Programs: 1972-1974, Statistical Abstract of the United States, 1974, U.S. Department of Commerce.

based upon a formula generally designed to measure the reasonable cost of hospital services.[3] One element in the formula takes into account the cost of capital expenditures such as those contemplated in the $4,000,000 expansion of Mary Elizabeth.[4] Unless the capital expenditure has been approved through a procedure set up under federal statute to prevent wasteful duplication of facilities, however, the provider will receive no payment under Medicare for that portion of its costs.[5] In addition to this form of regulation, Mary Elizabeth is also subject to regulation by the N.L.R.B. under the National Labor Relations Act.[6]

Clearly, the federal government has a vital interest in the provision of hospital services, in part because of its major role as an ultimate purchaser of these services. This role is at least as persuasive here with regard to jurisdiction under the Sherman Act as the role played by HUD in the financing of sewer projects.

In *Gulf Oil Corporation v. Copp Paving Company, Inc.*, — U.S. —, 43 U.S.L.W. 4059 (December 17, 1974) this Court reiterated its previous statements regarding the scope of Congressional power exerted under the Sherman Act:

> "Moreover, our cases have recognized that in enacting § 1 Congress 'wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements . . .' *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944)."

The decision of the Court of Appeals below adopts too restrictive a view of the power of Congress to prohibit anti-competitive conduct and monopolization of a market which the federal government already pervasively regulates and finances.

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[3] 42 U.S.C. § 1395 *et seq.*

[4] 42 U.S.C. § 1395(v)(1).

[5] 42 U.S.C. § 1320(a)-1.

[6] 29 U.S.C. § 151 *et seq.*

The importance of determining the scope of Congressional power exerted under the Sherman Act with regard to performing services in contrast to the manufacture and sale of goods has been recognized by this Court in granting a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the case of *Goldfarb v. Virginia State Bar, et al.*, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 419 U.S. 963 (1974), Dkt. No. 74-70.

B. The Court of Appeals Below, in Holding That the Provision of Hospital Services Is, as a Matter of Law, a Purely Local, Intrastate Activity, Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

The Court of Appeals below held:

> "The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952)." (App. A-5)

In so holding, the Court of Appeals below relied on two decisions in which the only allegation considered by either court supporting jurisdiction related to an unspecified number of out-of-state patients which used or might use the hospital in question. The meager allegations regarding jurisdiction considered by the Courts of Appeal in both *Elizabeth* and *Spears* severely restrict their applicability here where HBC alleged numerous other facts showing its place in the flow of interstate commerce. In addition, the Court of Appeals below failed to consider that both *Elizabeth* and *Spears* were decided before the advent of federal financing and regulation of hospital services under Medicare and Medicaid and the expansion of national private health insurance companies.

This question must be viewed in the light of the position of this Court, reiterated in *Gulf Oil Corporation v. Copp Paving Company, Inc., supra,* that Congress, in enacting the Sherman Act, went "to the utmost extent of its constitutional power in restraining trust and monopoly agreements."

The concept of interstate commerce is not static but adjusts to the reality of the market place. *Swift and Co. v. United States,* 196 U.S. 375 (1905). In economic reality, the ultimate purchasers of hospital services today, as clearly shown in this case, are (i) national private health insurance companies and (ii) the federal government under its Medicare and Medicaid programs. The days when an individual receives from and pays the provider for hospital services out of his own pocket are over. The flow of interstate commerce begins with the purchase of the goods and services necessary to provide hospital services and continues through the payment of these services by such ultimate purchasers.

In *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), this Court faced a similar issue. The business of insurance had not been viewed previously as "commerce". This Court, in a landmark decision, acknowledged the vital importance of insurance to each citizen and the growth of a nation-wide network in insurance which had developed as a practical economic matter over the years. This Court held the business of insurance to be "commerce" within the meaning of the Sherman Act and subject to jurisdiction under the Sherman Act because it was in the flow of interstate commerce.

In explaining this decision, this Court stated:

> "Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among

> the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state" (pp. 541-542).

It is precisely this inter-relationship between the cost of hospital services rendered in local markets such as Wake County and both (i) the premiums paid by all policy-holders of national private health insurance companies and (ii) the expenditures of the federal government under Medicare and Medicaid to which Judge Winter, dissenting in the Court of Appeals below, referred as follows:

> "If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred." (App. A-21)

As this Court decided with the insurance business, no exception from the coverage of the Sherman Act should be made for the hospital business.

Instead of following *Spears* and *Elizabeth,* the Court of Appeals below should instead have adopted the view of the "in commerce" test stated by the United States Court of Appeals for the Ninth Circuit in *Rasmussen v. American Dairy*

Association, 472 F. 2d 517 (9th Cir. 1972), *cert. denied* 412 U.S. 950 (1973):

> ". . . the power of Congress over commerce among the states is not a 'technical legal conception,' divorced from economic reality. *See* United States v. South-Eastern Underwriters Ass'n, *supra*, 322 U.S. at 547, 64 S.Ct. at 1170. . . . As Justice Cardozo noted in his dissent in Carter v. Carter Coal Co., 298 U.S. 238, 328, 56 S.Ct. 855, 880, 80 L.Ed. 1160 (1936), the words and phrases used to define the commerce power must be interpreted 'with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.' Whether the requisite 'substantial economic effect' or 'substantial relation to the national interest' is present or absent is a practical, case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae. Mandeville Island Farms v. American Crystal Sugar Co., *supra*, 334 U.S. at 232-233, 68 S.Ct. 996; United States v. South-Eastern Underwriters' Ass'n, *supra*, 322 U.S. at 546-547, 64 S. Ct. 1162; Wickard v. Filburn, *supra*, 317 U.S. at 119-125, 63 S.Ct. 82." (footnotes omitted) (at p. 523).

The decision of the Court of Appeals below in holding the provision of hospital services to be purely local, intrastate commerce is inconsistent with the decisions of this Court and with the approach articulated in *Rasmussen*.

In addition, as this case makes clear, it will be difficult for hospitals seeking to enter or expand within a market other than a major metropolitan area to meet the jurisdictional requirements under the "effect on commerce" test. Consequently, the federal government as the ultimate purchaser of a vast amount of these services will be virtually unprotected by the Sherman Act from conspiracies to foreclose entry and

to monopolize. It is important that this Court limit *Elizabeth* and *Spears* to their own economic era and their own facts in order to adjust the concept of interstate commerce to meet the new circumstances in the market for hospital services as presented in this case.

C. The Court of Appeals Below in Affirming Dismissal of a Sherman Act Complaint for Failure to State a Claim Sanctions a Departure From the Usual and Accepted Course of Judicial Proceedings Which Should Be Corrected by This Court.

The decision of the Court of Appeals below seriously weakens the effectiveness of the private action pursuant to Section 4 of the Clayton Act as a means of enforcing the antitrust policy of the United States. This Court has frequently recognized the vital role played by such private actions. *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

Without allowing any discovery and without the submission of any evidence, the District Court below dismissed HBC's complaint, as determined by the Court of Appeals below, for failure to state a claim on which relief can be granted.

The law on this point is well summarized in *Chapiewsky v. G. Heileman Brewing Company*, 297 F.Supp. 33, 38 (W.D. Wisc. 1968):

> "Summary dismissal in private antitrust actions should be sparingly granted because of the nature of the issues involved and because it may be difficult to plead more precisely the effects on interstate commerce until discovery has been had. See Poller v. Columbia Broadcasting Sys-

tem, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L.Ed. 2d 458 (1962); Radovich v. National Football League, 352 U.S. 445, 454, 77 S. Ct. 390, 1 L.Ed. 2d 456 (1957); Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148, 154-155 (D. Minn. 1967); Donlan v. Carvel, 209 F. Supp. 829, 831 (D. Md. 1962)."

See: *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn., supra; Donlan v. Carvel*, 209 F. Supp. 829, 831 (D. Md. 1962).

As observed by the Fifth Circuit in *St. Bernard, supra*, the Court of Appeals below "announced its decision not without considerable trepedation, terming it 'a rare exception to prove the rule that judgments on the pleadings in antitrust cases will ordinarily be reversed'." (App. E-10).

In announcing its decision, the Court of Appeals below further stated:

> "Our task would be much simpler had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extreme time and effort would have been worthwhile." (App. A-3).

Nevertheless, the Court of Appeals below did not reverse the district court and remand for limited discovery. In contrast, the district court in *St. Bernard, supra*, had required the "submission of affidavits and depositions in the nature of summary judgment proof", but, even so, the Fifth Circuit remanded the case for additional proceedings.

The departure of the District Court below, sanctioned by the Court of Appeals' majority opinion below is unwarranted, has a substantial adverse impact on the effectiveness of the private antitrust action in enforcing the antitrust policy of the United States, and is in conflict with governing decisions of this Court.

CONCLUSION

The decision of the Court of Appeals below is in conflict with decisions of other Courts of Appeal. It fails to follow decisions of this Court. It raises an important question of federal law which should be decided by this Court with regard to the position of providers of hospital services in the flow of interstate commerce. In sanctioning a departure from the usual course of judicial proceedings, it threatens the effectiveness of private actions in enforcing the antitrust policies of the United States.

The petition for certiorari should be granted.

Dated: May 16, 1975.

Respectfully submitted

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APPENDICES

APPENDIX A

Opinion

(Filed February 18, 1975)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,
Appellant,

Federation of American Hospitals,
Amicus Curiae,

versus

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

(Argued October 3, 1974 Decided February 18, 1975)

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL, FIELD, and WIDENER, Circuit Judges, sitting en banc.

John K. Train, III, and Timothy S. Perry (Jordan, Morris and Hoke and Alston, Miller and Gaines and John R. Jordan, Jr., on brief) for Appellant; (Carl Weissburg, Lawrence E. Mindell and

Weissburg, Jacobs and Gerst on brief for Amicus Curiae Federation of American Hospitals); Ray S. Bolze and John H. Anderson (Thomas W. Steed, Jr.; John R. Fornaciari; Allen, Steed and Pullen; Smith, Anderson, Blount and Mitchell; Howrey, Simon, Baker, and Murchison; Lillard H. Mount; Richard M. Hutson, II; and Hofler, Mount, White and Long on brief) for Appellee.
CRAVEN, Circuit Judge:

In this action filed pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, appellant Hospital Building Corporation (HBC) sought treble damages in excess of $2 million and injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The sole question before us is whether the district court erred when it dismissed HBC's amended complaint on the ground that it failed to allege a sufficient nexus with interstate commerce to invoke the Sherman Act.

I

The motion to dismiss was lodged under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Whether termed "lack of jurisdiction over the subject matter" or "failure to state a claim upon which relief can be granted," the result of such a motion, if granted, is the same. Dismissal under Rule 12, the lineal descendant of demurrer, is, of course, merely a decision on the pleadings. For that reason, such motions "are granted sparingly and with caution." 5 Wright & Miller, Federal Practice and Procedure, § 1349, at 541. Especially is this so in antitrust cases "because it may be difficult to plead more precisely the effects on interstate commerce until discovery has been had." *Chapiewsky v. G. Heileman Brewing Co.*, 297 F. Supp. 33, 38 (W.D. Wis. 1968). Generally, we think that where a question of fact arises as to the substantiality of the impact of a local restraint on interstate commerce, the question should not be decided on a motion to dismiss. *Donlan v. Carvel*, 209 F. Supp.

829, 831 (D. Md. 1962). Our task would be much simpler had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extra time and effort would have been worthwhile.

Whether the complaint was dismissed for lack of subject matter jurisdiction *or* failure to state a claim upon which relief could be granted is not clear. Since Congress specifically has conferred jurisdiction of Sherman Act claims (15 U.S.C. §§ 15 and 26), we think it the better analysis to treat an insufficient plea of effect upon interstate commerce as a failure to state a claim upon which relief can be granted rather than lack of jurisdiction (in the sense of power) over the subject matter. So viewed, our distaste for judgment on the pleadings is even greater, for a motion to dismiss for failure to state a claim "is viewed with disfavor and [should be] rarely granted." 5 Wright & Miller, *supra*, § 1357 at 598.

Nevertheless, we have concluded to affirm. That we do so should be taken by the bar and the district judges as a rare exception to prove the rule that judgments of dismissal on the pleadings in antitrust cases will ordinarily be reversed.

II

HBC operates in Raleigh, North Carolina, a 49-bed proprietary hospital, Mary Elizabeth Hospital, which offers general medical-surgical hospital services to the public. The appellee, referred to by HBC in its brief and hereinafter by us as "the Raleigh Group," are a North Carolina corporation that runs a hospital in competition with Mary Elizabeth in Raleigh and various individuals involved in the provision of medical-surgical hospital services in Raleigh. HBC alleged below that, beginning

at least as early as 1970 and continuing through the present, the Raleigh Group together with others not parties to this suit have engaged in a conspiracy aimed at controlling the number of hospital beds, allocating customers (hospital patients), and otherwise exercising unreasonable restraints of and monopolizing the market for medical-surgical hospital services in "the Raleigh area," defined as "the area comprising Wake County, in the State of North Carolina."

HBC professed to have discovered the conspiracy in late 1971 when it undertook to relocate Mary Elizabeth and expand it from 49 to 140 beds. According to HBC the Raleigh Group and their coconspirators devised a scheme involving bad faith efforts to block authorization of the expansion,[1] tactics to hold up implementation of HBC's plans once authorization was gained, and finally malicious instigation of adverse publicity and general public antipathy. HBC alleged that the scheme has delayed expansion of Mary Elizabeth, and asked as damages treble the amount of direct costs and loss of revenue attributable to the delay. HBC also sought injunctive relief against a continuation of the alleged conspiracy. Because we conclude that the district court was correct in finding that even if HBC proved all of its factual allegations it still would have shown an insufficient connection with interstate commerce to invoke the Sherman Act, we affirm.

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[1] At the time HBC sought authorization, North Carolina law required a certificate of need prior to hospital expansion. *See* In Re Certificate of Need for Astron Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), in which the requirement was held to violate the constitution of North Carolina.

III

An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect on* interstate commerce.

Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974) (emphasis added). *See also Goldfarb v. Virginia State Bar*, 497 F.2d 1, 16 (4th Cir.), *cert. granted*, 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974) (No. 74-70); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269, 271-72 (2d Cir. 1964). Within this traditional analytic framework the question for decision is whether the conspiracy described in HBC's complaint has either directly restrained *or* substantially affected interstate commerce.

IV

There is little basis for HBC's assertion that the alleged conspiracy acts directly in interstate commerce. The Raleigh Group is concerned exclusively with restraining Mary Elizabeth's provision of hospital services and with controlling the market for such services in the Raleigh area. The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952). Therefore, anticompetitive conduct aimed at the provision of such services necessarily acts *directly* only upon *intrastate* commerce. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952); *Elizabeth Hospital, Inc. v. Richardson, supra; Riggall v. Washington County Medical Society*, 249 F.2d 266,

268 (8th Cir. 1957); *cert. denied*, 355 U.S. 954 (1958); *Spears Free Clinic v. Cleere, supra.*

HBC's argument that the Raleigh Group's anticompetitive conduct occurred "in commerce" amounts to this: (1) Mary Elizabeth, and hospitals in general, have become substantially enmeshed in the interstate commerce network through their use of interstate communications facilities, their subjection to extensive federal regulation, their purchases of materials and services from out-of-state, their treatment of patients from other states, and their financial arrangements with national health insurers and government welfare programs; (2) the conspiracy directly affected Mary Elizabeth; therefore, the conspiracy, by acting upon a hospital so entwined in interstate commerce, acted directly upon interstate commerce. We accept the premises of the syllogism but reject the conclusion.

It is settled that the "in commerce" test is not whether the conduct complained of is aimed at a business engaged in interstate commerce, but whether the conduct complained of acts directly upon the interstate aspects of such a business. *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-34 (1947); *Sun Valley Disposal Co. v. Silver State Disposal Co., supra*, 420 F.2d at 343; *Lieberthal v. North Country Lanes, Inc., supra*, 332 F.2d at 271; *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306, 308-09 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961). Here, no matter how entwined in our increasingly national economy Mary Elizabeth and other Raleigh area hospitals may be, the fact remains that the conspiracy complained of directly affected only one aspect of those hospitals' businesses, namely the provision of surgical-medical hospital services in the Raleigh area. And the provision of such services remains what it always has been: a local, intrastate activity, not interstate commerce.

In its argument that "in commerce" jurisdiction exists HBC relies heavily on language from *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973). We cannot see the relevance of that case to our situation for purposes of the "in commerce" test. The court in *Rasmussen* indicated, although it did not decide conclusively, 472 F 2d at 524-25, that the "in commerce" test was met by a restraint on the intrastate sale of a filled-milk product called "Go" which was manufactured instate from ingredients all but one of which originated out of state. The court was able to suggest that the restraint acted directly upon the flow of commerce formed by "Go" and its ingredients because—as the court said—"for all practical purposes, the out-of-state ingredients *are* 'Go.' " *Id.* at 525 (original emphasis). *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Here, in contrast, there is no out-of-state product that is passed to patients in an economic transaction as a dominant ingredient of hospital services in the Raleigh area. Probably the only out-of-state products sold by Mary Elizabeth are drugs, and they are sold not so much as part of the interstate trade in drugs, but rather as a small and inseparable component of the *service* provided by Mary Elizabeth. This case is therefore different from *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 386-87 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962), where the court found sales of drugs by pharmacies part of the interstate commerce flow of drugs: there, the drugs in their flow from manufacturer to ultimate consumer never lost their character as both a *product* and a distinct line of commerce.

V

It is not so easy to decide the result under the second, or "affecting commerce," branch of the analysis. Here the fact that the Raleigh Group's conduct acted directly only upon a local market and a local aspect of Mary Elizabeth's business is

not dispositive. The question remains whether that conduct, though local in its immediate motive and effect, nevertheless so substantially[2] affects interstate commerce as to invoke the Sherman Act. That can only be a matter of degree, and such matters are never clean:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Association, supra, 472 F.2d at 526.

HBC suggests several ways in which interstate commerce has been affected by the Raleigh Group's thwarting of the Mary

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[2] The volume, amount, or quantity of interstate commerce involved is irrelevant under the "in commerce" test, but may be crucial under the "affecting commerce" test. *See* Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391 n.6, 395 (4th Cir. 1974); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526-28 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); Las Vegas Plumbers Merchant Ass'n v. United States, 210 F.2d 732, 739-40 n.3 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954); United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1065-66 (S.D. Ohio 1971). As in other contexts, *see, e.g.,* United States v. LeFaivre, No. 74-1239 (4th Cir. Dec. 4, 1974), the Congress utilized its recognized power over commerce to reach detrimental activity. "The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . ." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). Thus if anticompetitive conduct occurs *in* commerce, to whatever degree, the Sherman Act is triggered. But if anticompetitive conduct occurs wholly *intra*state, Congress has left to the courts to decide whether such conduct "is sufficiently related to interstate commerce to justify the prohibition of that conduct as 'necessary and proper' to the protection of interstate commerce against the presumed economic burdens resulting from the anti-competitive practices." Rasmussen v. American Dairy Ass'n, *supra,* at 524.

Elizabeth expansion. Neither the hospital's interstate purchases of supplies and equipment,[3] its billings to national insurance companies and the federal government,[4] nor its purchases of management services from its parent corporation[5] have increased as they would were the hospital to expand. And the $4 million cost of expansion was to be financed by non-North Carolina lenders, so that substantial interest payments would flow across state lines.

Aware that such decisions should be exercises of reasoned economic judgment rather than applications of mechanistic formulae, *see Rasmussen v. American Dairy Association, supra,* 472 F.2d at 523, we conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce.[6] Although not controlling, this fac-

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[3] Mary Elizabeth's purchases totalled $112,846 in 1972, 80 percent of which sum was paid pursuant to national contracts negotiated by HBC's parent corporation.

[4] Such billings represented approximately 95 percent of Mary Elizabeth's total billings in 1972.

[5] $36,000 in 1972. HBC's parent corporation was incorporated and is located outside of North Carolina, so that the purchase of services can be deemed interstate.

[6] An example of anticompetitive conduct that is aimed at a local market and yet directly and purposefully affects interstate commerce is that in United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945). Liquor dealers in Colorado conspired to fix retail liquor prices within the state, a purely local aim. But as a means of accomplishing their purpose they agreed both to compel out-of-state liquor producers to enter into fair trade contracts and to boycott those producers who failed to do so. The Supreme Court in finding Sherman Act jurisdiction focused upon this tactic of the conspirators, stating that "[w]hatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado." 324 U.S. at 298.

tor is relevant to the issue of substantiality. *See, e.g., Spears Free Clinic v. Cleere, supra,* 197 F.2d at 127; *Marstion v. Ann Arbor Property Managers (Management) Association,* 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam,* 422 F.2d 836 (6th Cir.), *cert. denied,* 399 U.S. 929 (1970). Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets,[7] it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected. In short, we are unconvinced that the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act. *Cf. Page v. Work, supra,* 290 F.2d at 332-33.

In deciding that there is here insufficient impact on interstate commerce to invoke the Sherman Act we do not overlook *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3d Cir. 1973). The Third Circuit in that case found jurisdiction over an alleged conspiracy of Blue Cross and a hospital planning agency aimed at manipulating the Greater Philadelphia hospital services market to Blue Cross's benefit. The court based its finding on the fact that the conspiracy, if successful, could shut down many of the approximately 100 hospitals in the Greater Philadelphia area, which could affect as much as $23 million per year in interstate shipments of supplies. According to the court, and we agree, this potential effect upon the traffic in out-of-state goods was "substantial enough" to invoke the Sherman Act. 490 F.2d at 53.

We think *Doctors, Inc.* is distinguishable. There is simply no significant comparison between the effect on commerce of

[7] *Cf.* Rasmussen v. American Dairy Association, 472 F.2d 517, 527 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973); "The basic issue . . . is the extent to which a prohibition of the defendants' specific conduct is justifiable as a means of protecting *the specific line of interstate commerce involved.*" (emphasis added).

one small hospital's delayed expansion, especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area. The *Doctors, Inc.* court carefully distinguished its situation from *Lieberthal v. North Country Lanes, Inc., supra,* and *Page v. Work, supra,* referring to them as "good law" and "the kinds of cases which remain beyond the reach of interstate commerce jurisdiction." 490 F.2d at 54. We agree and conclude that this case resembles *Lieberthal* and *Page* more than *Doctors, Inc.*[8]

Having quite plausibly, we think, fit this case into its appropriate pigeonhole entitled "nonsubstantial or de minimis effect on interstate commerce," we are left with a feeling of dissatisfaction. Labeling one case "de minimis" and another as "affecting commerce" does achieve a result but is not otherwise very revealing. Anyone who studies decisions applying the "affecting commerce" test will be struck by the absence of a clear line, much less a bright one, between those effects that are deemed substantial and those that are characterized as "indirect," or "fortuitous," or "insubstantial," or "de minimis," or "sporadic," or "incidental." In any area so very gray it is absurd to suppose that we or any other court can precisely count up the tons of plaster, bottles of liquor, or quantity of proprietary drugs sufficient to cross the line of substantiality. Increasingly, intrastate economic conduct affects interstate commerce due to the interdependence of all segments of our national economy. Whether or not "de mini-

[8] In *Lieberthal* the conspiracy was aimed at preventing the opening of one bowling alley, as here it is aimed at preventing expansion of one hospital. In *Page* the court found that a conspiracy to control legal advertising in a local market would not substantially affect commerce in newsprint and other products, since by far the major consumers of such products remained untouched by the conspiracy; here, as noted in the body, the failure of Mary Elizabeth to expand could have no noticeable detrimental effect on the various lines of commerce suggested by HBC.

mis" has ever been an effective litmus for application of the Sherman Act, we doubt that it now is, and we are concerned that conventional impact analysis may sometimes conceal rather than reveal the true rationale of decision.

Rather than attempt a quantitative measurement of interstate involvement, we should, perhaps, consider instead the real danger, in a practical sense, of anti-competitive conduct to the flow of commerce, or the potential destructive power of a conspiracy. It seems to us that courts have been doing that for a long time without necessarily saying so. Such an approach is implicit in the format and choice of words of Mr. Justice Black in *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954). The opinion runs only three pages. The approach is a sweeping one suggesting indignation that a local group of people were "able to *dictate* who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all." 347 U.S. at 189 (italics added). Such restraints are characterized as capable of causing "unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois." *Id.* Notable by its absence is any quantitative analysis. Omitted is any detailed narrative of the type of commerce involved. Instead there is simply a note of impatience that any district judge could possibly have dismissed a Sherman Act complaint that alleged defendants' power to *control* the intrastate market.

Similarly, in *Burke v. Ford*, 389 U.S. 320 (1967), the Supreme Court peremptorily reversed a court of appeals in a two-page per curiam. The economics of the case and description of the commerce involved were reduced to a footnote. The Court focused not on how many bottles of bourbon went from place to place but on its apprehension that this *intra*state conspiracy would "invariably reduce competition" and cause a price increase. 389 U.S. at 321.

The evil of monopoly power is the theme of both *Employing Plasterers* and *Burke*. Not one word is said about whether the anticompetitive conduct substantially *or* insubstantially affects interstate commerce.

In our case there is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that it can do any more than delay, at most, whatever expansion seems economically wise to the plaintiff. In *Doctors, Inc.*, on the other hand, the plaintiffs alleged that defendants had the power to shut down a hundred hospitals. Thus the real difference between our case and *Doctors, Inc.* may be not so much the quantitative difference in effect on interstate commerce as the dramatic difference in anticompetitive *power*—the danger Congress sought to guard against. Viewed in such a manner the cases seem more persuasively different than if simply stuffed into their respective pigeonholes of insubstantial and substantial impact on interstate commerce.

AFFIRMED.

ADDENDUM

On December 17, 1974, after the preparation of the opinion in this case, the Supreme Court released its decision in *Gulf Oil Corp. v. Copp Paving Co.*, No. 73-1012. Mr. Justice Powell's opinion for the Court notes that the grant of certiorari was limited to questions arising under the Clayton and Robinson-Patman Acts. What is said about the Sherman Act, by way of comparison with those Acts, is not new, slip opinion at 7-8. Although dictum as to the Sherman Act, we think language on page 12 of the slip opinion is consistent with our belief that problems of application of trade control statutes cannot be solved by counting units of merchandise.

> The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national marketplace. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets.

WINTER, Circuit Judge, dissenting:

Although I concurred in the panel decision affirming the district court's dismissal of the amended complaint for failure to allege a sufficient nexus with interstate commerce to sustain a cause of action under the Sherman Act, I am now persuaded that the holding was incorrect. In my view, this amended complaint may not be dismissed *on the pleadings*. Of course, I express no view as to whether the jurisdictional allegations can be proved, but plaintiff should be afforded the opportunity to establish them, if not at trial, at least by a *prima facie* showing to defeat any motion by defendants for summary judgment. I therefore dissent from the majority's affirmance of the district court's dismissal of the amended complaint under Rule 12, F.R.Civ.P.

I

The amended complaint alleges that the action is brought to redress actions of the defendants which constitute "(1) a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and (2) an attempt to monopolize in violation of Section 2 of the Sherman Act. . . ." Before the specific allegations of fact to support these jurisdictional assertions are considered, it is well to consider the scope of application of the Sherman Act. What combinations and conspiracies in restraint of trade and what attempts to monopolize does the Sherman Act prohibit?

There is no novelty in the answer. The settled law was recently restated in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, —U.S.—, 43 L.W. 4059 (December 17, 1974). See also *Greenville Publishing Co. Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 395-96 (4 Cir. 1974). *Gulf Oil* was a case which turned on the jurisdictional requirements of § 2(a) of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. It held that intrastate sales of asphalt for use in the construction of interstate highways were not sales "in commerce" within the ambit of the two Acts. In arriving at this result, the Court reviewed the jurisdictional scope of the two Acts and compared them with the jurisdictional scope of the Sherman Act.[1]

The Court contrasted the "in commerce" concept of the Robinson-Patman Act and the Clayton Act with the jurisdictional scope of the Sherman Act, saying:

> This "in commerce" language differs distinctly from that of § 1 of the Sherman Act, which includes within its scope all prohibited conduct "in restraint of trade or commerce among the several States, or with foreign nations. . . ." *The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of*

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[1] The Court noted that § 2(a) of the Robinson-Patman Act forbids "any person engaged in commerce, in the course of such commerce" to make price discriminations "where either or any of the purchases involved in such discrimination are in commerce" and where the effect of the discrimination is to suppress competition "in any line of commerce." It also recited that § 3 of the Clayton Act renders unlawful tie-in sales or exclusive dealing arrangements by "any person engaged in commerce" where the effect "may be to substantially lessen commerce or create a monopoly in any line of commerce," and that § 7, forbidding certain acquisitions, similarly applies to acquirers engaged "in commerce" and prohibits them from acquiring the stock or assets of another corporation engaged "in commerce" where the effect may be substantially to lessen competition "in any line of commerce in any section of the country." It concluded that application of both acts turned on the concept of "in commerce," defined in § 1 of the Clayton Act as "trade or commerce among the several States and with foreign nations. . . ."

goods. Moreover, our cases have recognized that *in enacting § 1 Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, *however local its immediate object, a "contract combination . . . or conspiracy" nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. E.g., Mandeville Island Farms, Inc v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 464 (1949). (Emphasis in text added.) 43 L.W. at 4062.

With the standard of what the Sherman Act encompasses so clearly defined, I have no hesitancy in concluding that plaintiffs have alleged a sufficient adverse *effect* on interstate commerce to confer jurisdiction on the district court to decide the case on its merits.[2] Under *Gulf Oil*, the test is one of congressional power, and the question is whether Congress could reach the alleged conduct under the commerce power. This is the clear meaning of the statement that ". . . Congress 'wanted to go to the utmost extent of its constitutional power' . . ." The majority holds in effect that the alleged activity is too tenuously related to interstate commerce in a practical sense to justify federal regulation for antitrust reasons. In reaching this conclusion, the majority opinion, as its addendum demonstrates, applies a test designed for determining the jurisdictional ambit of the

[2] Of course, if the rendition of local hospital services was "in commerce," the Sherman Act would clearly apply. But no court has so held, and I think that the majority's conclusion that HBC's activities are not "in commerce" is a correct one.

Clayton and Robinson-Patman Acts. *Gulf Oil*, however, teaches that this test is inappropriate for actions brought under the Sherman Act. In any event, the majority's conclusion is based upon determinations of: (1) the quantitative impact on interstate commerce of the alleged conduct, assessed in terms of precedent sustaining and rejecting complaints, and (2) the qualitative importance of the anticompetitive power alleged in the complaint. By both, I think that proper application of the Sherman Act can be demonstrated.

II

As the majority opinion states, the conspiracy in which defendants allegedly engaged was to prevent Hospital Building Company (HBC) from expanding the capacity of its proprietary Mary Elizabeth Hospital in Raleigh, North Carolina, from 49 to 149 beds. HBC is a wholly-owned subsidiary of Charter Medical Corporation (Charter), which has its principal office in Macon, Georgia, and which, by contract, provides management services to HBC for a fee, including the negotiation of contracts for the purchase of hospital supplies. Suppression of the expansion, it was charged, was to enable defendants to reduce competition in local hospital services by HBC and to enable defendants to control the local hospital service market and thus to allocate it among themselves.

HBC averred that the alleged conspiracy had the following effects on interstate commerce:

> (1) It purchases approximately 80% of its supplies and medicines from vendors in states other than North Carolina. In 1972, excluding food and supplies for its kitchen, it purchased $112,846 of supplies for its radiology, medical laboratory, and electrocardiology operations and its pharmacy. If the hospital were enlarged from 49 to 149 beds, such purchases in interstate commerce would not only continue but increase substantially.

(2) It regularly uses interstate communication, including the mails, to carry out its operations. It pays Charter a fee under the management contract with it. The fee is based on gross receipts, and for 1972 the fee was approximately $36,000. If the hospital were expanded, the amount of the fee would increase substantially.

(3) The fees for hospital services and charges for many of the patients at the existing hospital are paid by insurors and other providers outside of North Carolina. Although not alleged, it may be inferred that if the hospital were expanded fees paid by out-of-state providers would increase substantially.

(4) If the hospital were increased from 49 to 149 beds, the cost thereof would exceed $4,000,000. That cost would be financed by one or more loans with one or more lenders located outside of North Carolina. Payment of principal and interest would extend substantially into the future, and it would require regular remittances to a lender outside of North Carolina.

Conclusorily, HBC alleged that the combination and conspiracy which it charged has "a substantial and direct effect on interstate commerce." I agree. The allegations establish the suppression of an interstate cash flow that would be both substantial and continuing. *Cf.* Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964). I therefore am of the view that jurisdiction was alleged to exist in accord with the test reiterated in *Gulf Oil*.

III

Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F. 2d 48 (3 Cir. 1973), as the majority points out, is a stronger case than the instant one for concluding that the alleged conspiracy had a substantial effect on interstate commerce and

that the Sherman Act applied. In *Doctors*, the named plaintiff purchased $233,430 in supplies from out-of-state suppliers in the test year. Although this figure does not seem to be of any greater magnitude than the projected flow alleged by the plaintiff here, the majority relies on the fact that Doctors' Hospital was typical of the approximately one-hundred other hospitals in the area against all of which the conspiracy was directed, so that it could properly be inferred that interstate purchases of great magnitude were jeopardized. The distinction, however, is largely without difference. *Gulf Oil* reminds us that, in enacting § 1 of the Sherman Act, Congress was exercising to the *fullest extent* its constitutional power to restrain trusts and monopolies. Thus, it is not only the "big" resultant restraint on interstate commerce that it outlawed; the "little" resultant restraint on interstate commerce is outlawed too so long as a direct adverse effect on interstate commerce is demonstrated and that effect is not *de minimis*.

To be more specific, in *Doctors* the argument was advanced, as urged by the defendants here, that the object of the conspiracy was the intrastate activity of the rendition of hospital services and the effect on interstate commerce was indirect and insubstantial, so that the Sherman Act was inapplicable. In *Doctors*, the argument was rejected in terms which make that case a relevant and persuasive authority for reversing the district court in the instant case. Analyzing Burke v. Ford, 389 U.S. 320 (1967), and U.S. v. Employers Plasterers Ass'n, 347 U.S. 186 (1954), the Third Circuit pointed out that in both the Supreme Court found that a sufficient effect on the flow of out-of-state supplies to local businesses had been alleged to confer Sherman Act jurisdiction. 490 F.2d at 52. More importantly, "there [was not] even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy. Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." 490 F.2d at 53.

I recognize and accept that there are instances in which the effect on interstate commerce of anticompetitive conduct aimed at local activities may be too insubstantial to invoke Sherman Act jurisdiction. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2 Cir. 1964) (the one-time equipping of a new local bowling alley), and Page v. Work, 290 F.2d 323 (9 Cir. 1961) (alleging conspiracy to control legal advertising, thus causing a newspaper specializing in such advertising to sell its assets to another publisher who continued the paper and continued to buy the same quantity of newsprint from out-of-state sources), are good examples. But the instant case is more like *Doctors* than *Lieberthal* and *Page*. If HBC were permitted to expand, its purchases in interstate commerce and its other interstate activities would increase. It follows that an alleged conspiracy to prevent its expansion has an adverse effect on interstate commerce—not *de minimis*—and should be held to support jurisdiction under § 1 of the Sherman Act.

IV

Similarly, I view the anticompetitive power alleged here as substantial. In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power which "Congress sought to guard against" is merely to disbelieve the plaintiff's allegations. In the Sherman Act, not only the "evil of monopoly power," but the evil of improper attempts to achieve it are condemned. Where, as here, the out-of-state plaintiffs suggest that local official power and processes were used to delay and deter them, the plaintiffs implicate not only antitrust policy as such, but also the "national market" concerns which animate the commerce clause itself.

HBC's allegations about the flow of financing, management services, and supplies to the hospital from out-of-state have been stated. Additionally, HBC alleges that the overwhelming majority of the fees paid to it come from the federal government and from out-of-state providers. Money thus flows from Blue Cross, private insurers, and the federal government to the hospital and thence to out-of-state suppliers, managers, and financiers. While this construction of the facts may not put HBC's provision of hospital services in the "flow" of commerce as that term is used in the case law, it does make it graphically clear that if HBC is affected, a wide range of interstate connections is affected.

There is, furthermore, a clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants.

Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes.

Judge Butzner and Judge Field authorize me to say that they, too, dissent and concur in this dissenting opinion.

APPENDIX B

Order

(Filed June 11, 1974)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Order

The petition for rehearing of Hospital Building Company, containing a suggestion for rehearing in banc, has been referred to the entire court. A poll on the suggestion for rehearing was requested and a majority of the judges eligible to vote have voted to grant rehearing in banc.

Accordingly, it is ORDERED that the motion for rehearing in banc be, and it is hereby, granted; the previous opinion of the panel is withdrawn; and the Clerk is directed to restore the case to the hearing calendar and to fix a date for rehearing in banc during a regular session of the court as soon as practicable. The Clerk is further directed to fix a schedule for the filing of supplemental briefs if either of the parties desires to file the same.

For the Court:

/s/ HARRISON L. WINTER
United States Circuit Judge

APPENDIX C

Opinion

(Filed February 6, 1974)

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-1627

Hospital Building Company,

Appellant,

v.

Trustees of The Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr.,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued December 6, 1973 Decided: February 6, 1974

Before BRYAN, WINTER and WIDENER, Circuit Judges.

John K. Train, III (John R. Jordan, Jr., Timothy S. Perry, Jordan, Morris and Hoke, Alston, Miller & Gaines, on brief) for Appellant; Ray S. Bolze (Thomas W. Steed, Jr., John H. Anderson, John R. Fornaciari, Allen, Steed & Pullen, Smith, Anderson, Blount & Mitchell, Howrey, Simon, Baker & Murchison, on brief) for Appellees; (Carl Weissburg, Lawrence E. Mindell, Weissburg, Jacobs and Gerst, on brief for Amicus Curiae Federation of American Hospitals).

PER CURIAM:

After oral argument, review of the briefs and review of the record, we are not persuaded that the district court was in error when it concluded that the effect of defendants' alleged conspiracy in restraint of trade was neither to restrain activities in the flow of interstate commerce nor to restrain local activities having a substantial effect on interstate commerce.

AFFIRMED.

APPENDIX D

Opinion

(Filed March 23, 1973)

In the United States District Court
for the Eastern District of North Carolina
Raleigh Division

Hospital Building Company, Plaintiff vs. Trustees of the Rex Hospital, a Corporation; Joseph Barnes; George Stockbridge; Richard Urquhart, Jr., Defendants	Civil No. 4048

Order

The plaintiff, a North Carolina corporation, which operates a private hospital for profit in the City of Raleigh, has brought this civil antitrust action against the defendant Rex Hospital, also located in Raleigh, the defendant, Joseph Barnes, its administrator, and Richard Urquhart, Jr., one of its trustees. The defendant, George Stockbridge, is executive secretary of the Health Planning Council for central North Carolina. Jurisdiction has been involved under the Sherman Act, 15 U.S.C. §§ 1 and 2. Alleging violations of these statutes, the complaint charges defendants, and certain other named "co-conspirators" not made parties to the action, with having "engaged in an unlawful combination and conspiracy in unreasonable restraint of . . . trade and commerce in the furnishing of medical-surgical hospital services" and "an attempt by defendant Rex to monopolize, and to conspire . . . to attempt to monopolize, the paid hospital business conducted by non-public hospitals in the Ral-

eigh area . . ." The case is before the court on the motions of the defendants to dismiss for lack of subject matter jurisdiction and the failure of the complaint, as amended, to state a claim upon which relief can be granted.

Central to defendants' motions is the contention that the facts alleged by plaintiff do not show that the alleged wrongdoing on the part of defendants has affected interstate commerce in a direct and substantial way necessary to invoke the provisions of the Sherman Act. To meet the challenge of these motions the plaintiff filed an amendment to its complaint alleging with more specificity the scope of its activities in interstate commerce which the alleged wrongdoing of defendants is affecting. The allegations of the amendment to the complaint may be briefly summarized as follows:

> 1. Plaintiff is the wholly-owned subsidiary of a Delaware corporation which owns, directly or indirectly, and operates or manages medical-surgical hospitals in five states and Puerto Rico.
>
> 2. Plaintiff purchases on a regular and continuing basis substantial amounts of goods, supplies and medicines from vendors in states other than North Carolina.
>
> 3. Plaintiff regularly utilizes interstate communications, including the mails, telephone and telegraph to carry on its business.
>
> 4. A substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals.
>
> 5. Plaintiff receives a substantial part of its revenue from medicare, medicaid and hospital insurance benefits from insurance companies located outside North Carolina.
>
> 6. The planned expansion of plaintiff's present facilities will cost in excess of four million dollars which will be financed through one or more lenders located outside North Carolina.

> 7. Plaintiffs present hospital is accredited by the Joint Commission on Accreditation of Hospitals, a national organization which promulgates standards for the operation of hospitals.

These various activities show unmistakably that the plaintiff engages in transactions in interstate commerce, but it does so only incidentally to the conduct of its principal business which is that of operating a hospital in Raleigh, North Carolina. All of the cases involving hospital and medical services seem to indicate that this is strictly a local, intra-state business. *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959); *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson v. Lull*, 145 F. Supp. 134 (N.D.Ill. 1956); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952). Yet it is the conduct of this business of the plaintiff upon which the alleged unlawful restraint of defendants is operating, not those interstate activities which plaintiff finds necessary or expedient in the conduct of its hospital business.

But,

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

The conclusion is that the conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect

interstate commerce. The Sherman Act has therefore not been properly invoked, and the court is without subject matter jurisdiction. *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964).

Accordingly, it is now Ordered that the motions of the defendants are allowed and the action is dismissed.

United States District Judge

March 23, 1973

/s/ F. T. DUPREE, JR.

APPENDIX E

Opinion

(Filed April 7, 1975)

ST. BERNARD GENERAL HOSPITAL INC., Plaintiff-Appellant,

v.

HOSPITAL SERVICE ASSOCIATION OF NEW ORLEANS, INC., et al., Defendants-Appellees.

No. 74-2186.

United States Court of Appeals, Fifth Circuit.

April 7, 1975.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BELL, THORNBERRY and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

This is an appeal from a judgment dismissing an antitrust complaint for want of federal jurisdiction. We reverse and remand.

The facts necessary to our decision were well stated by the district court in an unpublished opinion, from which we generously borrow for purposes of our statement of the case. The

plaintiff, St. Bernard General Hospital, Inc. ("St. Bernard"), instituted this suit as a class action to recover treble damages for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1. The defendant, Hospital Service Association of New Orleans, Inc. ("Hospital Service"), is a non-profit mutual insurance association established to provide payment in favor of subscribers for the expense of complete hospital care. Hospital Service obtained a license to use the trade name "Blue Cross" in order to sell hospitalization insurance under the Blue Cross plan in the parishes of Orleans, Jefferson, St. Charles, Plaquemine, and St. Bernard. The licensor, American Hospital Association, was originally named a defendant but was later dismissed. No appeal was taken from the order dismissing American Hospital Association.

Very basically, the Blue Cross plan involves group prepayment of hospital charges to Hospital Service with a reciprocal agreement by member hospitals to render medical services to subscribing insureds. The member hospitals are compensated by Hospital Service for the medical assistance they provide to subscribers. The universe of eligible subscribers includes not only residents of the five local parishes, but also any Blue Cross insured who holds a policy issued by another licensee of American Hospital Association. Thus, it can and does occur that a New York resident may receive treatment in a New Orleans member hospital pursuant to a Blue Cross policy issued by a New York licensee. Conversely, a New Orleans subscriber with Hospital Service is eligible for insured treatment in a New York member hospital. These non-resident claims and charges are settled through a clearing house process which is utilized by the various plans across the country on a monthly collection basis. If a subscriber is treated at a non-member hospital, Hospital Service will make the reimbursement specified by the subscriber's policy to the insured or to the non-member hospital, if the insured has executed an assignment. The

subscriber's coverage, however, is less comprehensive when a non-member hospital performs treatment.

Hospital Service originally consisted of the Touro Infirmary, the Southern Baptist Hospital, the Mercy Hospital, and the Hotel Dieu. In the health insurance trade these are known as "participating" hospitals, and they are so termed in their contracts with Hospital Service. Today there are other "participating" hospitals in the greater New Orleans area: the Ear, Eye, Nose and Throat Hospital, the Flint-Goodridge Hospital, the Oschner Foundation, the Sara Mayo Hospital, and the West Jefferson Hospital. In order to acquire "participating" status a hospital must meet several requisites: it must be accredited, it must be operated on a non-profit basis,[1] and it must enter into a particular kind of contract with Hospital Service. The contract requires the hospital to render medical services to subscribing insureds and entitles it to compensation from Hospital Service for the necessary and proper charges billed to the insured. In return, the "participating" hospital agrees to bear a portion of the expense of underwriting Hospital Service if the association becomes insolvent or its reserves become inadequate. The "participating" hospitals do not exist entirely at the mercy of events, however, for each is afforded two seats on Hospital Service's Board of Managers, and each is entitled to vote for remaining managers who are elected at large.

Hospitals like the plaintiff and its fellow class members, which operate for profit, may also become members of Hospital Service. They do so by signing a contract under which they are known as "contracting" hospitals. Presently there are ten such "contracting" hospitals, including St. Bernard, in the New Or-

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[1] In its submission to the district court and in its brief to this court plaintiff, St. Bernard, contended that at least one of these "participating" hospitals, the Oschner Foundation, in fact earns a profit from its services. Because of the nature of the district court's ruling, discussed *infra*, no finding or opinion was expressed with respect to this contention. Consequently, we express none.

leans area. These members have no voting rights in the election of Hospital Service's management. On the other hand, they have no obligation to underwrite the association in case of insolvency or depleted reserves.

This lawsuit revolves around the contractual provisions between the for-profit hospitals and Hospital Service as those provisions detail the manner in which a "contracting" hospital is compensated for Blue Cross-insured treatment. The contracts provide that Hospital Service will reimburse 100% of the charges billed to the subscriber. Such reimbursement, however, may not exceed the average per diem payment or the average per case payment made to "participating"—i.e., non-profit—hospitals. Thus, the parties stipulate that for-profit hospitals like the plaintiff have been and will be required in various years to rebate to Hospital Service amounts collected from the association in excess of the average wholesale cost of services rendered at non-profit hospitals.

In its complaint, plaintiff alleged that these required rebates are fixed arbitrarily by the defendant and the "participating" members; that this so-called "premium to do business" with the defendant constitutes the product of an unlawful agreement in restraint of interstate commerce; and that the contractual scheme has injured plaintiff and its fellow for-profit hospitals by forcing them either to forfeit all profit on Blue Cross business and at times incur losses, or else pass the amount of the rebate on to the insured patient, which presumably would encourage Blue Cross subscribers to utilize only the "participating" non-profit hospitals. In its brief, plaintiff alleges more specifically a group boycott by the defendant and "participating" hospitals, which plaintiff asserts is a per se violation of Sherman Act, § 1.

The merits of the dispute were not reached below; indeed no answer was ever filed. Instead, defendant Hospital Service tendered a motion to dismiss for lack of jurisdiction or alternatively for failure to state a claim. Upon the submission of affidavits and depositions in the nature of summary judgment proof, the district court considered only the jurisdictional question. The plaintiff argued that jurisdiction should be sustained, either because for-profit hospitals render occasional services to out-of-state residents, or because hospitals must purchase drugs, equipment, and supplies from out-of-state sources in order to deliver health care at the local level. Although the complaint did not allege specific quantities or dollars-and-cents representing interstate purchases by plaintiff or any member of its class, the defendant did not attack the sufficiency of the pleadings. Rather, the defendant and the district court both took the position that whether plaintiff treated out-of-state patients or purchased products in interstate commerce was essentially immaterial to the question of Sherman Act jurisdiction.

Accordingly, relying on Page v. Work, 9th Cir. 1961, 290 F.2d 323,[2] several recent district court cases,[3] and a few earlier cases from other Circuits,[4] the court ruled that its inquiry was confined to one of characterizing the precise activity upon which the alleged restraint most directly impacted. Having determined that activity to be the rendition of hospital services, the court required that the activity itself either constitute an enterprise in interstate commerce, or, if predominately intrastate, that it "substantially affect" interstate commerce. The

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[2] "The test of jurisdiction is not that the act complained of affect a business engaged in interstate commerce but that the conduct complained of affects the interstate commerce of such business." 290 F.2d at 330.

[3] Nankin Hospital v. Michigan Hospital Service, E.D.Mich. 1973, 361 F.Supp. 1199; Doctors, Inc. v. Blue Cross of Greater Philadelphia, E.D.Pa. 1973, 360 F.Supp. 693; Hospital Building Co. v. Trustees of Rex Hospital, E.D.N.C. 1973, 1973 Trade Cas. ¶ 74,428.

[4] Elizabeth Hospital, Inc. v. Richardson, 8th Cir. 1959, 269 F.2d 167, cert. denied, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120; Riggall v. Washington County Medical Society, 8th Cir. 1957, 249 F.2d 266, cert. denied, 355 U.S. 954, 78 S.Ct. 540, 2 L.Ed.2d 530 (1958); Spears Free Clinic and Hospital for Poor Children v. Cleere, 10th Cir. 1952, 197 F.2d 125.

district court then held as a matter of law "that the rendition of hospital services is a purely local activity." Therefore, it concluded, "the practice of the defendant is allegedly restraining a local activity of the plaintiff not in interstate commerce, and the Sherman Act is inapplicable, unless the plaintiff can demonstrate that the alleged restraint of the local function 'substantially affects interstate commerce'."

Applying this latter part of its holding, but without any weight to plaintiff's jurisdictional arguments, the district court rejected plaintiff's contention with respect to treating out-of-state patients on the assumption that the likelihood that such a patient would seek treatment at a particular hospital is too incidental or "remote." As for the argument based on drugs and supplies purchased in interstate commerce, the court stated that "[w]hat is essentially an intrastate activity is not transformed into interstate commerce by reason of such purchases, and there exists no substantial effect on interstate commerce by indirect effect of reducing prospective purchases of supplies in interstate commerce."

In the context of this class action involving allegedly predatory agreements imposed by Hospital Service upon ten for-profit hospitals, we reject the district court's scheme of analysis. Specifically, we disagree with the court's purely-local-as-a-matter-of-law premise from which all conclusions, as well as the putative absence of a "substantial effect" on interstate commerce followed. On the other hand, we are not entirely convinced that the plaintiff has made a sufficient showing to sustain Sherman Act jurisdiction. For example, plaintiff asserted neither in its complaint nor in its submissions below that defendant's conduct has caused or will cause any member of the complaining class to cease treating patients from other states or to curtail purchases of supplies from interstate sources. As matters currently stand, plaintiff essentially contends that certain contract provisions simply prevent New Orleans area for-profit hospitals

from earning a profit on Blue Cross business. Hence, we reverse the judgment below solely on the basis of its unbending legal position. On remand, all issues—including the sufficiency of the complaint for purposes of Sherman Act jurisdiction—will be open for full consideration in light of whatever amendments the parties may offer, the evidence as it develops, and the factors we mention in the following discussion.

At the outset, we note that this court has already rejected the narrow reading of Page v. Work, *supra*, which permeates the district court's decision. In Lehrman v. Gulf Oil Corp., 5th Cir. 1972, 464 F.2d 26, 36, cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665, we stated:

> We do not accept the suggestion that Page v. Work holds, as a matter of law, that a conspiracy to restrain trade in an intrastate product cannot, as a matter of law, affect trade in another, interstate product sufficiently to trigger Sherman Act jurisdiction. The focus of the Act is to protect interstate trade from interferences of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business. We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the "interstate culpability" of those who engage in anticompetitive practices. No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involvement in interstate commerce as they find them.

Significantly, *Lehrman*, like this case, involved allegedly illegal practices perpetrated most visibly at the local level. Never-

theless, numerous businesses were victimized in that, *inter alia*, the defendant's conduct reduced their ability to purchase and sell goods from interstate commerce. This factor in itself was held to constitute one alternative basis of Sherman Act jurisdiction. Concerning the defendant's argument that, assuming some effect on interstate commerce the effect was jurisdictionally insufficient because purchased items often "came to rest" intrastate before resale, we noted that the requisite effect is nonetheless accomplished by "a reduced or altered flow of goods into the State . . . from without the state." Thus, "Lehrman's business did have an impact on interstate commerce that was not 'insignificant or insubstantial.'" *Id.* at 35. *See also* Copper Liquor, Inc. v. Adolph Coors Co., 5th Cir. 1975, 506 F.2d 934, at 949. In other words, it was not *de minimis*.

Subsequent to *Lehrman*, we have had occasion to consider and reaffirm its broad jurisdictional implications for Sherman Act cases. In Battle v. Liberty National Life Ins. Co., 5th Cir. 1974, 493 F.2d 39, a class action was brought by a group of Alabama funeral homes contesting allegedly illegal burial policy arrangements whereby "authorized" funeral homes—i. e., those that entered into service contracts with the defendants—were reimbursed for a greater range of services to insureds than were the non-contracting, or "unauthorized," homes. Although we observed that the case was not adequately developed to permit a conclusive determination of jurisdiction, we recognized that certain of plaintiffs' allegations, if substantiated, would establish Sherman Act jurisdiction under *either* the "in commerce" or "substantial effect" tests. Among these allegations were: that the plaintiffs used caskets purchased out-of-state in performing services under the burial policies; that they purchased clothing, embalming fluids, and other funeral necessities from out-of-state sources; and that they performed funeral services under the policies for residents of other states who died in Alabama. We stated that "[i]f these facts are established, it appears that such activities, when considered *in the aggregate*, would have a sub-

stantial impact on interstate commerce [i. e., not "insignificant or insubstantial"], and thus satisfy the jurisdictional requirement under the Sherman Act." 493 F.2d at 48 (emphasis ours).

Besides citing *Lehrman*, the *Battle* court cited Doctors, Inc. v. Blue Cross of Greater Philadelphia, 3rd Cir. 1973, 490 F.2d 48, reversing D.C., 360 F.Supp. 693. In the case *sub judice* the district court relied heavily on the lower court decision in *Doctors, Inc.* The Third Circuit's reversal apparently was not brought to its attention. In any event, we consider the Third Circuit's opinion well-reasoned, its distinctions of the authorities relied on by the court below soundly-drawn, and its rationale consistent with our decisions in *Lehrman* and *Battle*. Furthermore, *Doctors, Inc.* is in substance indistinguishable from the instant case with the one exception that our plaintiff's pleading is less specific in terms of allegations necessary to establish the interstate connections required for Sherman Act jurisdiction. *Compare* 490 F.2d at 50 nn. 3, 3a. Nevertheless, we emphasize that this case has proceeded as if the sole question were purely legal; no challenge to the sufficiency of the jurisdictional pleadings or the jurisdictional proof has been entered. Therefore, we do not believe that this one distinction should alter our conclusions.

In summary, we have not held that plaintiff St. Bernard has sustained Sherman Act jurisdiction, either for itself or for the class it seeks to represent. We have only held that, on remand, a proper view of the posture of this case in light of controlling precedent entitles the plaintiff to establish its right to a day in federal court. We do not consider our disposition to be in conflict with the very recent *en banc* opinion by the Fourth Circuit in Hospital Building Co. v. Trustees of the Rex Hospital, 4th Cir. 1975, No. 73-1627, — F.2d —.[5] There, with three judges

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[5] Nor is United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952), to the contrary. There, in a Sherman Act injunction suit brought by the government, the district court had found as fact that "[t]he sale of medical services, by

dissenting, the Fourth Circuit affirmed the dismissal of a single small hospital's Sherman Act complaint for lack of jurisdiction.[6] We believe the court's distinction of *Doctors, Inc.* likewise fully distinguishes the circumstances of this case. As the Fourth Circuit majority put it:

> There is simply no significant comparison between the effect on commerce of one small hospital's delayed expansion [which was the sole injury alleged by the plaintiff], especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area.

In this case, of course, fully ten of the nineteen New Orleans area Blue Cross member hospitals comprise the plaintiff class. Also, we note that the Fourth Circuit announced its decision not without considerable trepidation, terming it "a rare exception to prove the rule that judgments on the pleadings in antitrust cases will ordinarily be reversed." In view of this cautionary reminder, we are not disturbed that the logic of *Hospital Building Co.* argues for a result contrary to that which we have reached. Instead, we believe that our decision accords with the proposition to which we, as well as the Fourth Circuit, are firmly committed:

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress

Doctor Sponsored Organizations, as conducted within the State of Oregon, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law. . . ." 343 U.S. at 338, 72 S.Ct. at 698, 96 L.Ed. at 987. The Supreme Court upheld this finding as not clearly erroneous, stating, "[t]he appeal brings to us no important questions of law or unsettled problems of statutory construction. . . . Its issues are solely ones of fact." 343 U.S. at 330, 72 S.Ct. at 694, 96 L.Ed. at 983. In this case, by contrast, no testimony has yet been presented and no facts have been found.

[6] See note 3, *supra*.

> to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Rasmussen v. American Dairy Association, 9th Cir. 1973, 472 F.2d 517, 526, cert. denied, 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003; *Hospital Building Co., supra*.

Reversed and remanded.